May 10, 2005

Public Meeting To Discuss Technical Issues Associated With the National Pollutant Discharge Elimination System (NPDES) Stormwater Permit Coverage for Small Oil and Gas Construction Activities

[OW-2002-0068; FRL-7897-2]

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The Independent Petroleum Association of America (IPAA)* submits these comments to the Public Meeting To Discuss Technical Issues Associated With the National Pollutant Discharge Elimination System (NPDES) Stormwater Permit Coverage for Small Oil and Gas Construction Activities.

IPAA files these comments for itself and on behalf of the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Ocean Industries Association (NOIA), the National Stripper Well Association (NSWA), the Natural Gas Supply Association (NGSA), the Petroleum Equipment Suppliers Association (PESA), the US Oil & Gas Association (USOGA),* and the following organizations:

California Independent Petroleum Association
Colorado Oil & Gas Association
East Texas Producers & Royalty Owners Association
Eastern Kansas Oil & Gas Association
Florida Independent Petroleum Association
Illinois Oil & Gas Association
Independent Oil & Gas Association of New York
Independent Oil & Gas Association of Pennsylvania*
Independent Oil & Gas Association of West Virginia
Independent Oil Producers Association Tri-State
Independent Petroleum Association of Mountain States

* Organizations indicated by an asterisk are Petitioners or Intervenors in the appeals pending in *Texas Independent Producers and Royalty Owners Association et al. v. EPA* (5th Circuit Lead No. 03-60506) (relating to the scope of the oil and gas exemption) and *Wisconsin Builders Association et al. v. EPA* (7th Circuit Lead No. 03-2908) (relating to the 2003 Construction General Permit ("CGP") and Fact Sheet) [collectively the "Stormwater Litigation"].

Independent Petroleum Association of New Mexico
Indiana Oil & Gas Association
Kansas Independent Oil & Gas Association
Kentucky Oil & Gas Association
Louisiana Independent Oil & Gas Association*
Michigan Oil & Gas Association
Mississippi Independent Producers & Royalty Association
Montana Oil & Gas Association
National Association of Royalty Owners
Nebraska Independent Oil & Gas Association
New Mexico Oil & Gas Association
New York State Oil Producers Association
Northern Alliance of Independent Producers
Ohio Oil & Gas Association*
Oklahoma Independent Petroleum Association*
Panhandle Producers & Royalty Owners Association
Pennsylvania Oil & Gas Association
Permian Basin Petroleum Association
Petroleum Association of Wyoming
Tennessee Oil & Gas Association
Texas Alliance of Energy Producers*
Texas Independent Producers and Royalty Owners*
Virginia Oil and Gas Association
Wyoming Independent Producers Association

Together, IPAA and these other organizations represent the thousands of independent oil and natural gas explorers and producers who will be most significantly affected by the proposed action. Independent producers drill about 90 percent of domestic oil and natural gas wells, produce over 50 percent of domestic oil, and approximately 85 percent of domestic natural gas.

These organizations appreciate the opportunity to present materials regarding the approaches to managing stormwater during oil and gas construction activities and consequences resulting from those approaches. Before addressing specific issues, it is important to describe our perspective of the regulatory situation.

The Oil and Gas Exemption Under Section 402(*l*)(2) of the Clean Water Act.

It is our firm belief that, under the oil and gas exemption in section 402(*l*)(2) of the Clean Water Act, EPA cannot require permits for oil and gas construction activities, regardless of size, unless the discharge from a site is contaminated. Some of us are petitioners or intervenors in appeals relating to the scope of the oil and gas exemption and the 2003 CGP and Fact Sheet, which are pending before U.S. Courts of Appeals for the Fifth and Seventh Circuits (see previous footnote (*)). Oral argument has been heard in both circuits and the cases have been submitted to the courts for decision.

To the extent that EPA were eventually to propose to regulate oil and gas construction activities without requiring a permit, we would support such an action provided that regulation of oil and gas sites were justified based on scientific evidence of a water-quality need for such regulation; the states are properly consulted before proposal; and any conditions on a non-permit option were non-arbitrary, reasonable and consistent with good oil and gas industry practice, and directly related to the control of "contamination" in stormwater discharges, as Congress intended that term to apply to oil and gas sites.

We would not expect to support a "waiver" option, because the requirement for a "waiver" assumes that there is a permit requirement, which is an assumption with which we firmly disagree.

Common Plan of Development

Any proposal for a non-permit option that were to apply only small oil and gas construction activities would need to address the definition of "common plan." As noted above, we believe that there is a fundamental question of whether EPA is permitted to require a permit under section 402(*l*)(2) for both Phase I (five acres and larger) and Phase II (one to five acres) sites. EPA's requirement for Phase I sites to have a permit is further complicated by the "common plan of development" concept in the Construction General Permit (CGP). The "common plan" concept is inherently flawed and is confusing when applied to oil and gas construction activities. It requires projects to be permitted if, taken together, the components exceed the five acre permitting acreage threshold.

The EPA's "common plan of development" concept provided in its Construction General Permit is impossible to apply to oil and gas construction activities as it requires projects to be aggregated and permitted if the individual activities disturb five acres or greater. Data from the initial project can significantly alter the location or the initiation of any subsequent projects. For the producer, there is no "common plan of development" as compared to residential/commercial construction activities. Therefore any permit could not possibly determine aggregated area, or location of subsequent projects. Clearly the definition of "common plan of development" cannot be applied to the oil and gas industry.

Oil and gas operations are dependent on the success of one before the construction of the next. For the producer, there is no common plan. This common plan of development scheme should not apply. Each single project should be evaluated separately against the five acre threshold. This issue is discussed more fully in Appendix 1.

No-Permit Option Possible If Adequately Justified

EPA has suggested that it is considering using section 402(*p*)(6) as an approach to address oil and gas construction activities. If this approach is to be used, several conditions must be met to satisfy the law.

First, if EPA intends to regulate oil and gas construction activities under section 402(*p*)(6), before proposing any such new rule, it must consult with affected states (including oil and gas regulatory authorities) regarding whether there is a need (based on scientific evidence) for regulation and to what extent regulation is necessary.

Second, section 402(*p*)(6) and section 402(*l*)(2) fit together. We do not believe that EPA can impose additional regulations on oil and gas construction activities under section 402(*p*)(6), beyond and unrelated to the requirement in section 402(*l*)(2) that stormwater discharged from an oil and gas site not be contaminated. If EPA were to attempt to do that, we do not see how such regulations could be justified under section 402(*p*)(6). Congress provided for the protection of water quality under section 402(*l*)(2) by limiting the availability of the oil and gas exemption to stormwater discharged from an oil and gas site that is not "contaminated," as Congress intended that term to be applied to oil and gas activities. EPA has already defined contamination in 40 C.F.R. § 122.26(c)(1)(iii) to include stormwater discharged from an oil and gas site that contributes to a water quality standard violation (or constitutes a reportable-quantity release).

Before proposing a new rule imposing Federal regulation on uncontaminated stormwater from oil and gas construction activities, section 402(*p*)(6) would require that EPA justify the need for and necessary extent of any such regulation. We do not see how Federal regulation of *uncontaminated* stormwater discharges—which by EPA's own definition do not contribute to a water quality standard violation—can be legally or scientifically justified under section 402(*p*)(6) as necessary to protect water quality.

Assuming that these issues can be resolved, EPA should approach its stormwater concerns during oil and gas construction activities through a flexible management process rather than a rigid permitting regime. Management techniques are widely utilized currently to manage stormwater and they are readily available. Correspondingly, the potential consequences of applying a permitting regime raise serious issues regarding lost domestic oil and natural gas production without attendant environmental benefits.

Reasonable And Prudent Practices for Stabilization (RAPPS) Can Effectively Manage Stormwater

The oil and natural gas exploration and production (E&P) industry has managed its construction activities to limit stormwater runoff. Logically, for development activities to occur at its sites, a producer must have a stable and secure pad to support the heavy equipment needed to drill wells. In 2004, the industry compiled a compendium of stormwater management practices in use in the industry to control contamination in stormwater. These controls vary based on terrain and rainfall circumstances. These were documented as *Reasonable And Prudent Practices for Stabilization* (RAPPS). Subsequently, these RAPPS were made widely and freely available for members of the industry through access on IPAA's website and numerous other trade association websites. The RAPPS document provides a straightforward methodology to guide a producer to an array of practices for a given situation. This tool allows the producer the flexibility to find a technology that fits the circumstances and the budget while providing the appropriate environmental protection. A copy is included in Appendix 2.

The Current Construction General Permit Would Result In Severe Adverse Energy and Economic Consequences

While RAPPS create a flexible and effective approach, the current CGP produces significant adverse consequences. An independent economic analysis recently completed on behalf of the U.S. Department of Energy[†] estimates that these EPA regulations could cost the country between 1.3 and 3.9 billion barrels of domestic oil production and between 15 and 45 trillion cubic feet of domestic natural gas production over the next 20 years. Compliance costs and lost revenue to the industry could range between $382 million to $2,883 million per year from the stormwater permit requirement (with the higher number being characterized by DOE as a "higher impact scenario" but "not necessarily . . . a 'worst case' scenario"[‡]). Moreover, these impacts do not include lost reserves, lost tax and royalty revenues, or energy replacement costs, which would increase the estimated impacts to the national economy to $2,725 million to $7,883 million per year. A copy of the Department of Energy analysis is attached as Appendix 3.

Conclusion

We appreciate this opportunity to submit these comments to the Public Meeting To Discuss Technical Issues Associated With the National Pollutant Discharge Elimination System (NPDES) Stormwater Permit Coverage for Small Oil and Gas Construction Activities.

Resolution of the EPA regulatory structure to manage stormwater during oil and gas construction activities is essential to assure that domestic oil and natural gas production will be able to meet its significant role in the national energy framework. We believe that we are effectively managing stormwater during construction. However, if the CGP is implemented it will result in significant lost domestic production, not improved environmental quality. Our joint goal should be to find the path that meets both the nation's energy needs and its environmental values.

If you have any questions about these comments, please do not hesitate to contact Lee Fuller of IPAA at (202) 857-4722 or lfuller@ipaa.org.

[†] Report From Advance Resources International ("ARI"), Inc. to U.S. Department of Energy/Office of Fossil Fuels, Estimated Economic Impacts of Proposed Storm Water Discharge Requirement on Oil and Gas Industry (Final) (Dec. 7, 2004); *see also* Appendix A, Critical Factors and Key Assumptions Contributing to the Economic Impact of Potential New Storm Water Discharge Requirements (Dec. 7, 2004) (both available at www.fe.doe.gov/programs/oilgas/environment/publications)

[‡] ARI Report at 7.